United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

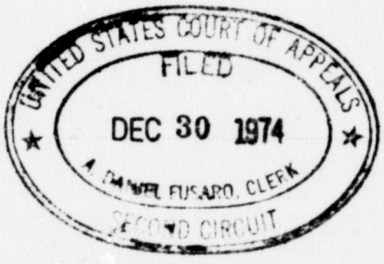
74-2257

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- HENRY JENKINS, Appellant.	Docket No. 74-2257

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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In answer to appellant's claim that it was error for the trial judge to refuse to instruct the jurors that they must find that the crime was committed in the Southern District of New York, the Government proffers several arguments, all of which are specious. For example, conceding that the only law in this Circuit and elsewhere is to the contrary, the Government nonetheless contends that the determination of the *situs* of the crime for purposes of venue is not an issue for the jury. Without citing any authority therefore, the Government

has the temerity to argue that this Court's decision in United States v. Gillette,* 189 F.2d 449 (2d Cir.), cert. denied, 342 U.S. 827 (1951), and the Fifth Circuit's decision in Green v. United States, 309 F.2d 852 (1962), are incorrect in requiring that venue be charged to the jury because these cases, in turn, cite no other authority for their conclusions. This assertion overlooks the fact that since the Magna Carta, when a criminal defendant was given the right now included in the United States Constitution, Art. III, §2, and Amendment Six, to a trial by jury selected from the district where the crime was committed** (Orfield, 2 Criminal Procedure Under the Federal Rules, §18:3), the issue as to where the crime occurred has, with regularity and unanimity, been presented to the jury.

To take the Government on its own terms, there is simply no authority for the proposition that venue should be determined by the court. To overrule United States v. Gillette, supra, 189 F.2d 449, is to overrule historically established practice.

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*See also United States v. Provoo, 215 F.2d 531, 537 (2d Cir. 1954), which reversed a conviction on newly discovered evidence because it would have been impossible for a jury to find venue.

**Historically, the rationale for this right was that the jury was the "source rather than the arbiter of the evidence." Orfield, Criminal Procedure from Arrest to Appeal, at 366-367 (1942). Clearly, at the time when jurors were chosen because of their personal knowledge of the crime, they alone were best suited to determine whether they had that knowledge.

Moreover, the Government presents no valid justification for removing the issue of venue from the jury. In this case, resolution of the issue turns solely on a question of fact -- did appellant possess the checks in Manhattan? -- and it is axiomatic that questions of fact are determined by the jury.*

Ignoring that the Government's failure of proof of venue will support a judgment of acquittal, United States v. Gross, 267 F.2d 816 (2d Cir.), cert. denied, 363 U.S. 831 (1960), the Government seems to suggest (Brief at 12-13) that merely because the issue may be waived resolution of the factual dispute as to where the crime occurred is, for some unexplained reason, removed from the ambit of jury consideration. Respondent's argument is a non sequitur. Numerous issues (e.g., statute of limitations, entrapment, insanity, duress) are undisputedly within the jury's sphere, despite the fact they can be waived.

Also without validity is the concern (Brief at 14) that the jury would be confused by differing burdens of proof. In at least the Fifth, Sixth, Eighth, and Ninth Circuits, where venue must be proved by a preponderance of the evidence, venue is still charged to the jury without mishap. United States v. Charlton, 376 F.2d 663 (6th Cir.), cert. denied, 387 U.S. 936

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*That some questions of fact are decided by the court does not render the exception the rule. Moreover, the example cited by the Government (Brief at 14) is inapposite. Preliminary factual determinations by the court for the purpose of ruling on the admissibility of evidence have a particular justification: such a procedure is the only way to insure that if the evidence is inadmissible the jury will not consider it.

(1967); Canley v. United States, 355 F.2d 175 (5th Cir.), cert. denied, 384 U.S. 951 (1966); Hill v. United States, 284 F.2d 754 (9th Cir. 1960), cert. denied, 365 U.S. 873 (1961); Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960); Dean v. United States, 246 F.2d 335 (8th Cir. 1957).

No doubt recognizing the weankess of its argument that venue is not for the jury, the Government alternatively asserts, despite the absence of support in the record, that Judge Gagliardi properly charged the jury on venue. This theory is culled from the fact that the Judge, in the course of his charge, read the indictment, which alleged that possession of the checks occurred in the Southern District of New York, and added that the Southern District encompassed Manhattan and the Bronx (212*). What the Government conveniently ignores is that nowhere was the jury instructed that all allegations in the indictment had to be proved. In fact, what the jurors were told indicated the contrary: immediately following this recitation of the indictment, the Judge told the jurors that positive findings as to four elements -- not including venue -- were the only prerequisites to conviction* (214).

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*Numerals in parentheses refer to pages of the transcript of the trial. The entire charge is annexed as "C" to appellant's separate appendix.

**This incorrect impression was not ameliorated by the Judge's earlier reading of the statute allegedly violated (18 U.S.C. §1708) which, of course, makes no mention of the situs of the crime.

Finally, shifting position to cover the eventuality that this Court will not accept this fanciful theory of an adequate venue instruction, the Government alternatively asserts that, in any event, appellant did not properly preserve the venue issue for appeal. First, there is the suggestion (Brief at 13) that appellant's failure to raise the issue at his first trial, which ended in a hung jury, waives the issue for all time. However, no authority for this remarkable position is cited. To the contrary, the authorities found specifically hold that a mistrial erases all prior proceedings so as to permit raising the venue issue at a second trial. United States v. Jenkins, 392 F.2d 303, 306 (10th Cir. 1968); United States v. Mischelich, 310 F.Supp. 669, 672 (D.N.J. 1970), affirmed, 445 F.2d 1194 (3d Cir.), cert. denied, 404 U.S. 984 (1971).

Also tendered as a basis for the waiver argument is the fact that defense counsel requested too high a burden of proof on the issue of venue and that this error in requesting proof beyond a reasonable doubt rather than proof by a preponderance of the evidence is tantamount to a failure to object. This theory is preposterous. Overlooked by the Government is the fact that as the issue evolved before the District Court it focused on whether venue had to be charged to the jury or if it could be determined by the Court (161-162). Additionally, when the Judge refused to charge venue, defense counsel specifically objected, stating that the Court should have instructed the jury that it must find that the crime was committed in the

Southern District of New York (227).

Even assuming that appellant asked for more than he was entitled to on the burden of proof, the issue as to whether the situs of the crime was for the jury to determine was clearly and unequivocally presented to the trial judge. United States v. Rodriguez, 465 F.2d 5, 8-9 (2d Cir. 1972).

For the foregoing reasons, and for the reasons raised in appellant's main brief on appeal,* the conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

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*The Government's answer concerning the error in the charge on witness credibility reveals a complete misconception of appellant's argument and the import of this Court's decision in Dyer v. McDougal, 201 F.2d 265 (1952). See appellant's main brief at 12-18.

Certificate of Service

December 30, 1974

I certify that a copy of this reply brief for appellant has been mailed to the United States Attorney for the Southern District of New York.